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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 50, 55, and 58

**[Docket No. FR-5423-P-01]
RIN 2501-AD51**

Floodplain Management and Protection of Wetlands

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would update and modify HUD's regulations governing the protection of wetlands and floodplains. With respect to wetlands, the proposed rule would codify existing procedures for Executive Order 11990 (E.O. 11990), Protection of Wetlands. HUD's current policy is to require the use of E.O. 11990's 8 Step Process for floodplains for actions performed by the Department or actions performed with HUD financial assistance. This rule will codify this policy and thereby improve consistency and increase transparency by placing the E.O. requirements in regulation. In certain instances, the new wetlands procedures will allow recipients of HUD assistance to use permits issued under section 404 of the Clean Water Act in lieu of five steps of the E.O. 11990's 8 Step Process, thereby streamlining the wetlands decision-making processes. With respect to floodplains, the proposed rule would prohibit HUD funding (e.g., Community Development Block Grants, HOME Investment Partnerships Program, Choice Neighborhoods, etc.) or Federal Housing Administration (FHA) mortgage insurance for the construction of new structures in Coastal High Hazard Areas. The current regulations allow for such new construction so long as the construction, is in accordance

with certain standards. This change is anticipated to have minimal effect, since HUD receives few requests to fund or insure mortgages for new construction in these areas.

The proposal would also make several other changes to HUD's floodplain and wetland regulations; the changes are designed to streamline floodplain and wetland environmental procedures and avoid unnecessary delays in processing. The procedures proposed by this rule would apply to HUD and to state, tribal, and local governments when they are responsible for environmental reviews under HUD programs.

DATES: Comment Due Date: **[Insert date 60 days from date of publication in the FEDERAL REGISTER].**

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other

commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Charles Bien, Acting Director Office of Environment and Energy, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW, Room 7250, Washington, DC 20410-8000. For inquiry by phone or email, contact Jerimiah Sanders, Environmental Review Division, Office of Environment and Energy, Office of Community Planning and Development, at 202-402-4571 (this is not a toll-free number), or via email at Jerimiah.J.Sanders@hud.gov. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

SUPPLEMENTAL INFORMATION:

I. Background

Federal departments and agencies (agencies) are charged by executive orders with incorporating floodplain management goals and wetland protection considerations in their respective agency's planning, regulatory, and decision-making processes. A floodplain refers to the lowland and relatively flat areas adjoining inland and coastal waters including flood-prone areas of offshore islands that, at a minimum, are subject to a one percent or greater chance of flooding in any given year (often referred to as the "100-year" flood). Wetlands refer to those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

Executive Order 11988 (E.O. 11988) entitled "Floodplain Management," dated May 24, 1977 (42 FR 26951), requires each federal agency to identify and evaluate practicable alternatives to locating in the floodplain. If it is not practicable to avoid the floodplain, then each federal agency must identify and evaluate the potential effects of any actions it may take in or affecting a floodplain. The goals of the Executive Order are: to avoid adversely impacting the natural functions of floodplains wherever possible; to ensure that the agency's planning programs and budget requests reflect consideration of flood hazards and floodplain management, including the restoration and preservation of such land areas as natural undeveloped floodplains; and to prescribe procedures to implement the policies and procedures of this Executive Order.

Executive Order 11990 (E.O. 11990), entitled "Protection of Wetlands," dated May 24, 1977, (42 FR 26961) directs each agency to provide leadership and take action to minimize the

destruction, loss, or degradation of wetlands. E.O. 11990 also directs each agency to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for: (1) acquiring, managing, and disposing of federal lands and facilities; (2) providing federally undertaken, financed, or assisted construction or improvements; and (3) conducting federal activities and programs affecting land use.

Although HUD has regulations on floodplain management at 24 CFR part 55, these regulations do not codify procedures for implementing E.O. 11990. Consistent with the intent of the executive orders, as noted above, HUD has relied to date on existing procedures established for floodplain management under 24 CFR part 55 to guide wetland protection considerations in planning, regulatory, and decision making processes. This rule proposes to codify in 24 CFR part 55 the procedures applicable to wetlands and authorized by E.O. 11990. Additionally, the hurricanes of 2005, particularly Hurricane Katrina, emphasized the need to review existing procedures on the protection of wetlands to determine how such procedures may be made more effective.

II. This Proposed Rule

Proposed Changes – Basis for Proposed Changes

First, this rule proposes to codify procedures authorized by E.O. 11990. As noted in the preceding section of this preamble, HUD has not promulgated regulations to reflect E.O. 11990. E.O. 11990 was issued in furtherance of the National Environmental Policy Act of 1969 (NEPA) as amended (42 U.S.C. 4321 *et seq.*). Through this rule, HUD proposes to adopt in regulation the procedures of E.O. 11990, in order to aid in the consistent application of policy and to increase compliance with it, by making the policy readily available in HUD's environmental regulations.

The wetland procedures authorized by E.O. 11990 require the completion of an eight-step process, referred to below as the “8 Step Process.” The 8 Step Process is administered by HUD, state governments, or units of local or tribal governments. Step 1 requires a determination of whether or not the proposed project to be developed with HUD financial assistance will be in a wetland. If so, Step 2 requires that a public notice be issued to inform interested parties that a proposal to consider an action in a wetland has been made. Following this notice, Step 3 requires the identification and evaluation of practicable alternatives to avoid locating the project in a wetland. Such an evaluation of alternatives shall include, for example, alternative locations outside the floodplain, feasible technological alternatives, and social values such as aesthetics, historic and cultural values, and land use patterns. Step 4 requires the identification and evaluation of the potential direct and indirect impacts associated with the occupancy or modification of wetlands. Step 4 also requires the identification of the potential direct and indirect support of floodplain and wetlands development that could result from the proposed action. Direct support consists of projects located in the floodplain such as housing, public service structures, or office buildings that require additional investment such as food service or parking. Indirect support for floodplain or wetland development can be caused by infrastructure that can induce further development due to proximity to the floodplain or wetland. Examples of indirect support include water and waste water systems, power supplies, roads, airports, and mass transit systems. Step 5 requires an analysis of practicable modifications and changes to the proposal to minimize adverse impacts to the wetlands and to the project as a result of its proposed location in wetlands. Under Step 6, the alternatives and the proposed wetland site are then reevaluated. If it is determined that there is no practicable alternative to the proposed wetland development, Step 7 requires a second notice to be issued to the public stating that the

decision has been made and providing details associated with the decision. After this second notice, Step 8 implements the action, including any mitigating measures that were established during the decision-making process. This evaluation process requires the same eight steps as E.O. 11988, Floodplain Management, which is currently being implemented by HUD and other federal agencies.

The rule also proposes to require appropriate and practicable compensatory mitigation for adverse impacts to more than one acre of wetlands. Compensatory mitigation resulting from other federal, state, or local governmental requirements can be used to fulfill this requirement. Compensatory mitigation approaches include permittee-responsible mitigation, mitigation banking, in-lieu fee mitigation, the use of preservation easements or protective covenants, and any form promoted and approved by the authority of the state governments or the Federal Government. In certain situations, compensatory mitigation may not be practicable or appropriate due to the cost of compensatory mitigation in a state or watershed, a lack of funds within the project, or other reasons that make compensatory mitigation impossible. One example would be an Alaska Native village that is mainly in a wetland and is surrounded by federal and state land. The cost in this situation could make compensatory mitigation inappropriate or impracticable.

Second, this rule proposes to allow HUD and HUD's recipients of assistance to use permits issued under section 404 of the Clean Water Act (33 U.S.C. 1344) (Section 404) in lieu of performing the first five steps of the 8 Step Process. This streamlined option will reduce costs and the processing time for complying with parts of the 8 Step Process for which adhering to the standard process affords minimal substantive benefit. The Clean Water Act establishes the basic structure for regulating discharges of pollutants into the waters of the United States and

regulating water quality standards for surface waters.¹ Section 404 of the Clean Water Act requires a landowner to obtain a permit from the U.S. Army Corps of Engineers (USACE) prior to beginning any nonexempt activity involving the placement of dredged or fill material in waters of the United States, including wetlands.

If the applicant has obtained an individual USACE Section 404 permit and submits the permit with its application for a HUD program, then HUD or the responsible entity will be required to complete only the last three steps of the 8 Step Process, and thus will be able to skip § 55.20(a) through (e). The last three steps include the publication of a single public notice, which will fulfill the early notice requirement of E.O. 11990 and thereby avoid the requirement under the usual 8 Step Process for the publication of two notices. If HUD or the responsible entity determines that a reevaluation or repeat of any of the steps is necessary to comply with E.O. 11990, HUD or the responsible entity will reevaluate and complete the necessary steps of the 8 Step Process. None of the 8 steps or any provisions of this rule should be interpreted as being requirements of the USACE's regulatory program. USACE has its own regulations, policies, and procedures, none of which are impacted by this proposed rulemaking.

Although Section 1(b) of E.O. 11990 excludes the issuance of permits for activities in nonfederal wetlands from coverage under the Executive Order, reliance on the Section 404 permitting process fulfills the Executive Order's intent. The exclusion for permits reflects the use of similar procedures and criteria for approval of a permitting action, including an initial public notice, consideration of practicable alternatives, and minimization of harm.

The issuance of a Section 404 permit may not substitute for processing under the 8 Step Process and compliance with E.O. 11988 where the property is also located in a floodplain.

¹ The Federal Water Pollution Control Act enacted in 1948 was significantly reorganized and expanded in 1972. "Clean Water Act" became the Act's common name with amendments in 1977.

Section 404 of the Clean Water Act also allows states to administer an individual and general permit program in lieu of the USACE permit program. Section 404 permits issued by state agencies may be used in lieu of the first five steps of the E.O. 11990 process under this regulation.

All wetlands subject to Section 404 of the Clean Water Act are wetlands for the purposes of E.O. 11990. However, the combined process proposed by this rule will not apply in all instances, because wetlands not considered waters of the United States under Section 404 of the Clean Water Act are typically wetlands for the purposes of E.O. 11990. Wetlands not subject to Section 404 of the Clean Water Act must be processed under the proposed 8 Step Process.

Third, the proposed rule would broaden the use of the current 5 Step Process for repairs, rehabilitations, and improvements. The 5 Step Process is an abbreviated 8 Step Process that omits Steps 2, 3, and 7. Steps 2, 3, and 7 require the publication of two notices and the consideration of alternative sites. The 5 Step Process is currently used for a variety of activities specified in 24 CFR 55.12(a), such as disposition of HUD-owned properties and mortgage insurance for the purchase, refinancing, or rehabilitation of existing multifamily structures, which are not subject to certain additional conditions. An 8 Step Process is currently required for financial assistance, other than mortgage insurance, for rehabilitation of nonresidential or residential structures with more than four housing units located in floodplains. Rehabilitations subject to the 5 Step Process are any repair, reconstruction, modernization, or improvement of a structure that does not result in a 20 percent increase in the number of dwelling units or in the average peak number of customers and employees. The proposed rule will allow these rehabilitations of residential properties and nonresidential properties, including weatherization, to forego Steps 2, 3, and 7 of the 8 Step Process. As outlined above, Steps 2, 3, and 7 are the

consideration of alternatives at Step 3 and the publication of the preliminary and final notice at Steps 2 and 7, respectively. This change will streamline project approvals and allow more resources to be devoted toward projects with greater impacts on floodplains and wetlands.

Fourth, the proposed rule would update a provision in HUD's regulations to require the use of preliminary flood maps and advisory base flood elevations in post-disaster situations where the Federal Emergency Management Agency (FEMA) has determined that existing Flood Insurance Rate Maps (FIRMs) may not be the "best available information" for floodplain management purposes. Currently, HUD's regulations at 24 CFR 55.2(b)(1) indicate that FIRMs are the only source of data for compliance with the 8 Step Process. In the wake of Hurricane Katrina, FEMA determined that the existing FIRMs may not reflect actual flood risk and issued Advisory Base Flood Elevations and Preliminary FIRMs. This change in map usage requirements will bring HUD's regulations into alignment with the requirement that agencies are to use the "best available information" located at Section 2(a)(1) of E.O. 11988. In addition, this change will provide greater consistency with floodplain management activities across HUD and FEMA programs.

Fifth, the proposed rule would exempt certain activities from the 8 Step Process for floodplain management compliance. Exempted activities include leasing structures insured with the National Flood Insurance Program (NFIP)² and not located in a floodway or Coastal High

² Congress established the National Flood Insurance Program with the passage of the National Flood Insurance Act of 1968. The NFIP is a federal program enabling property owners in participating communities to purchase insurance as a protection against flood losses in exchange for state and community floodplain management regulations that reduce future flood damages. Participation in the NFIP is based on an agreement between communities and the Federal Government. If a community adopts and enforces a floodplain management ordinance to reduce future flood risk to new construction in floodplains, the Federal Government will make flood insurance available within the community as a financial protection against flood losses. This insurance is designed to provide an insurance alternative to disaster assistance to reduce the escalating costs of repairing damage to buildings and their contents caused by floods. See <http://www.fema.gov/library/viewRecord.do?id=1480><http://www.fema.gov/library/viewRecord.do?id=1480>.

Hazard Area. The exemption for leased structures also requires that: (1) the leased structure is an existing structure; and (2) the structure is insured for its total value or up to the NFIP maximum as of the commencement of the lease term. If HUD or the grantee does not want to obtain flood insurance for the leased structure, the project can proceed by performing the 8 Step Process. Critical actions (e.g., hospitals, nursing homes, and emergency services) in a 100- or 500-year floodplain are not covered by this exemption. Other exempt activities include special projects to increase access for those with special needs, activities involving ships or water-borne vessels, and activities that restore and preserve natural and beneficial functions of floodplains and wetlands. These changes will reduce unnecessary delays.

Sixth, the proposed rule would prohibit HUD funding or FHA mortgage insurance for the construction of new structures in Coastal High Hazard Areas. This change would not affect existing structures. Existing structures would be eligible to receive funding, and disaster assistance would continue to be available for reconstruction of structures destroyed by a disaster. FHA mortgage insurance would continue to be available as long as the mortgage insurance is not used to finance new construction. HUD's current regulations allow new construction in Coastal High Hazard Areas, if new structures are constructed to FEMA's standards at 44 CFR 60.3(e) and are not critical actions. ("Critical action" refers to any activity for which even a slight chance of flooding would be too great, because such flooding might result in loss of life, injury to persons, or damage to property. See 24 CFR 55.2.) This change will prevent new development in Coastal High Hazard Areas, which will result in less development in areas of higher risk to lives and property. However, as discussed later in this preamble, HUD currently receives few requests to fund new construction or provide FHA

mortgage insurance for new construction in Coastal High Hazard Areas. The change will also further align HUD's development standards with those of FEMA grant programs.

Seventh, 24 CFR 55.26 would be amended to make clear that under the executive orders, HUD or a responsible entity may adopt previous review processes that were performed by another responsible entity or HUD. This change will prevent duplicative processing in cases where a project may have multiple recipients contributing funding or has funding that may not allow the responsible entity to perform the review. Nothing in the proposed rule or part is binding or applicable to the USACE or USACE processes. USACE has its own regulations, policies, and procedures, which are not impacted by this part.

Finally, the proposed rule will amend 24 CFR 58.35(a)(3)(i) by modifying the categorical exclusion from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321) for minor rehabilitation of one- to four-unit residential properties, by removing the qualification that the footprint of the structure may not be increased in a floodplain or wetland. Currently, four units can be constructed in a floodplain or wetland as an individual action under the categorical exclusion in § 58.35(a)(4)(i), but rehabilitated structures in a floodplain or wetland require a full environmental assessment. It is logically inconsistent to require a greater review for minor rehabilitations than for new construction. The proposed rule resolves this inconsistency but will still require part 55 processing for construction in floodplains and wetlands. HUD believes that this change will eliminate needless assessments without contributing to environmental degradation. HUD is basing its conclusion on a recent survey of its environmental experts.

Solicitation of Specific Comment

In addition to these proposed changes, HUD is also specifically soliciting public comment regarding a potential change to § 55.20(e). The change would require that all new construction of “critical actions” in the 100- or 500-year floodplain be elevated to the 500-year base flood elevation. A “critical action” is “any activity for which even a slight chance of flooding would be too great, because such flooding might result in loss of life, injury to persons, or damage to property.” Examples of critical actions include hospitals, nursing homes, emergency response centers, and flammable or explosive materials storage facilities. This potential change would make HUD’s regulations in 24 CFR part 55 more consistent with guidance documents issued by the Water Resources Council and consistent with FEMA’s E.O. 11988 regulations at 44 CFR 9.11(d)(3). This change would increase the current elevation standard for critical actions from the 100-year base flood level to the 500-year level.

Specific Regulations Proposed for Amendment

The specific regulatory revisions proposed to be made to HUD’s regulations are as follows:

Protection and Enhancement of Environmental Quality (Part 50)

Section 50.4 of HUD’s regulations in 24 CFR part 50, which address related federal laws and authorities, would be amended to have § 50.4(b), which addresses flood insurance, floodplain management, and wetlands protection, reflect the change in the title of 24 CFR part 55 to include “Protection of Wetlands” and reflect implementation of E.O. 11990 in 24 CFR part 55.

Floodplain Management (Part 55)

A. Purpose and Basic Responsibility

Section 55.1, which addresses the purpose and basic responsibilities of floodplain management, would be updated to better describe how to evaluate impacts on floodplains and wetlands and to provide that part 50 now explicitly address procedures on wetland protection. The mandatory purchase of flood insurance under the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001-4128) is currently required for federally funded construction and acquisition in FEMA's identified special flood hazard areas. The requirements of section 582 of the National Flood Insurance Reform Act of 1994 (42 U.S.C. 5154a), currently stated in HUD's regulations at 24 CFR 58.6, would be added to 24 CFR part 55 to support compliance with the mandatory purchase of flood insurance. Finally, the prohibition on floodway activities would be edited to allow for activities that support beneficial floodplain functions.

B. Terminology

Section 55.2, which defines terms used in floodplain management, would be amended to update existing terms in this section and add new terminology. To the extent that the names of these terms as designated by FEMA's regulations need to be updated, the proposed amendments would do so without any change to the basic meaning of these terms. With respect to new terms, the term "Compensatory mitigation" would be added consistent with the definition of the term promulgated by the Environmental Protection Agency and the United States Army Corps of Engineers (USACE) in 2008 (See Compensatory Mitigation for Losses of Aquatic Resources, 73 FR 19594). The terms "Wetlands" and "New Construction" would be added consistent with those defined by E.O. 11990. The definition of wetlands also includes a process for identifying wetlands and utilizing appropriate wetlands professionals. These are the only new terms added under the proposed rule.

C. Assignment of Responsibilities

Section 55.3, which delineates floodplain management responsibilities, would be amended to reflect the existence of “responsible entities” under 24 CFR part 58 (Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities) and the addition of E.O. 11990 wetland procedures.

D. Environmental Review Procedures

Section 55.10, which addresses the environmental review procedures under 24 CFR parts 50 and 58, would be amended to explicitly add wetland protection and reflect implementation of E.O. 11990 in part 55 as an element of the environmental review process.

Section 55.11, which addresses the applicability of floodplain management decision making as provided in 24 CFR part 55, subpart C, would be amended to incorporate the purpose of floodplain management, as provided in E.O. 11988, and the purpose of wetlands protection, as provided in E.O. 11990. The proposed rule also amends this section to adopt the previously explained 8 Step Process for wetlands. This process will provide a standardized and efficient method for addressing E.O. 11990. The proposed rule also would address adverse effects to floodplains and wetlands.

E. Inapplicability

Section 55.12, which addresses the inapplicability of floodplain management to certain categories of proposed actions, would be amended to remove HUD programs that no longer exist and add exemptions from the full process. Financial assistance for weatherizations and rehabilitations of multifamily structures would be granted the use of a shortened 5 Step Process that currently applies to mortgage insurance actions for rehabilitation and improvements. Floodplain and wetland restoration activities, including demolition, would be exempt from § 55.20 processing. Leasing of an existing structure would also be granted an exemption from the

8 Step Process, so long as the structure is not in a floodway or Coastal High Hazard Area, and the structure is insured with the National Flood Insurance Program. Additionally, the leasing exemption does not apply to critical actions in the 100- or 500-year floodplain. An exemption also would be added for special projects directed to the removal of material and architectural barriers that restrict the mobility of and accessibility to elderly and persons with disabilities. Financial assistance for ships and water-borne vessels would also be exempt from § 55.20 processing. These changes would reduce unnecessary processing and result in a decreased amount of analysis for projects that have no or little adverse impact or have beneficial effects.

F. Decision Making Process

Section 55.20, which currently addresses the decision making process for floodplain management, would be amended to include the decision making process for wetlands protection. Step 3 of the 8 Step Process, which requires the consideration of practicable alternatives, would also be amended to require that mitigation costs be considered.

G. Conveyance Restrictions

Section 55.22, which addresses conveyance restrictions for the disposition of multifamily real property, would be amended by adding the word “wetland” in each place where the term floodplains is addressed by the section.

H. Documentation

Section 55.27, which addresses documentation required in floodplain management, would add “wetlands” and remove a reference to 24 CFR 570.3 to allow for a general definition of “unit of general local government.”

I. Responsible Entities

Sections 55.21, 55.25, 55.26, and 55.27, which address notification of floodplain hazard, areawide compliance, adoption of another agency's review under the executive orders, and documentation, respectively, would change the terms "grant recipient" to "responsible entity." This would add specificity and consistency to 24 CFR part 55. Section 55.26 will also be edited to make it clear that HUD can adopt a review performed by a responsible entity, and that a responsible entity may adopt a review performed by HUD or another responsible entity.

J. Use of Individual Permits under Section 404 of the Clean Water Act for EO 11990 Processing

A new § 55.28 would be added to allow for HUD to process wetlands impacts and for recipients of HUD assistance to use permits issued under section 404 of the Clean Water Act in lieu of five steps of the E.O. 11990's eight-step process. Processing under this section will reduce the time devoted to environmental processes, by allowing an existing individual Section 404 permit to substitute for the first five steps of the 8 Step Process for wetlands located outside the floodplain.

K. Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities (Part 58)

Section 58.5 of HUD's regulations, which address related federal laws and authorities, would be amended to have § 58.5(b), which addresses flood insurance, floodplain management, and wetlands protection, reflect the change in the title of 24 CFR part 55 to include "Protection of Wetlands" and reflect implementation of E.O. 11990 in 24 CFR part 55. This proposed rule would also amend § 58.6, which addresses other requirements, by adding a new paragraph (a)(4) that would state that flood insurance requirements cannot be fulfilled by self-insurance except as authorized by law for assistance to state-owned projects within states approved by the FEMA Administrator consistent with 44 CFR 75.11. Additionally, HUD also proposes to amend §

58.35, which addresses Categorical Exclusions, by revising the categorical exclusion from environmental assessment under NEPA for minor rehabilitation of one- to four-unit residential properties by removing in § 58.35(a)(3)(i) the qualification that the footprint of the structure may not be increased in a floodplain or wetland.

III. Findings and Certifications

E.O. 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this proposed rule under E.O. 12866 (entitled “Regulatory Planning and Review”). The proposed rule has been determined to be a “significant regulatory action,” as defined in section 3(f) of the Order, but not economically significant, as provided in section 3(f)(1) of the Order.

The majority of the regulatory changes proposed by this rule will have minor economic effects. The primary purpose of this rule is to streamline the existing procedures pertaining to floodplain management and protection of wetlands that are already in place. However, two changes proposed by HUD are anticipated to have some economic effect. These two changes are: (1) HUD’s proposal to streamline the approval process for rehabilitations, repairs, and improvements of HUD-funded properties in floodplains and wetlands; and (2) HUD’s proposal to prohibit new construction that would either be funded by HUD or have mortgages insured by FHA in Coastal High Hazard Areas. The proposed streamlined process for rehabilitations will lower costs for projects, which could induce more improvement activities. The proposal to prohibit new construction in Coastal High Hazard Areas could affect the siting of properties, but these projects are rarely proposed or approved even in the absence of a prohibition.

Streamlined Procedures for Rehabilitations, Repairs, and Improvements of Multifamily Properties in Floodplains. HUD or responsible entities reviewing proposals for rehabilitations,

repairs, and improvements to multifamily properties located in floodplains are required to follow the 8 Step Process to minimize the impact to floodplains. The proposed change would abbreviate the process for these proposals, because the process no longer requires public notices or the consideration of alternatives for floodplain executive order compliance. The benefits of this proposed change arise from the reduced compliance costs associated with the eliminated steps. Total labor compliance costs for the entire 8 Step Process have been estimated at \$320 per project. A more detailed step-by-step cost estimate is not available. However, if eliminating the three steps saves 10 to 15 percent of the total labor cost of compliance, then each rehabilitation project would save between \$32 and \$48. Costs to publish the notices would be added to this amount for the overall cost of compliance. The precise number of proposed rehabilitation, repair, and improvement projects is not available, although the overall number is estimated to be less than 100 annually. Although the reduced compliance costs could, on the margin, induce an increase in the requests for funding, that increase is unlikely considering that the cost of these projects generally range from thousands to millions of dollars. For this analysis, HUD estimates an annual total of 100 projects, including the induced projects. One hundred such projects would produce benefits ranging from \$3,200 and \$4,800 plus minimal costs of publication. Since these assessments rarely lead to a different outcome for rehabilitation, repair, and improvement projects, the lost benefits of not conducting a full floodplain assessment—the cost of this provision—are negligible.

Prohibition on New Construction in Coastal High Hazard Areas. Prohibiting new construction in Coastal High Hazard Areas would force developers to locate HUD-funded or FHA-insured properties out of hazard areas subject to high velocity waters. This prohibition would not affect developments that are destroyed by floods and that need to be rebuilt. Existing

property owners interested in developing in Coastal High Hazard Areas would either incur transaction costs from selling the existing property and purchasing an alternative site, or obtain a more expensive source of funding/assistance. However, based on HUD's records, it is extremely rare for HUD to fund, or provide mortgage insurance for, a new construction proposal in these coastal areas. HUD found only one project that that been completed in a Coastal High Hazard Area, and one additional project is currently under review. These projects were approximately 6 years apart. Thus, HUD believes that this provision will not have a significant impact.

Accordingly, this proposed rule is expected to create an annual economic impact ranging from \$3,200 to \$4,800, which are avoided costs resulting from a streamlined approval process for rehabilitations of properties located in floodplains. Thus, the implementation of this rule will not create an impact exceeding the \$100 million threshold established by E.O. 12866.

The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202-402-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities.

The proposed rule would codify HUD's policies and procedures implementing E.O. 11990, Protection of Wetlands. The goal of the Executive Order is to prevent adverse impacts associated with the destruction or modification of wetlands. E.O. 11990 establishes a uniform set of requirements designed to meet this goal and that are applicable to both large and small entities. The proposed rule would also broaden the use of the abbreviated 8 Step Process also known as the 5 Step Process, used by HUD and responsible entities when considering the impact on floodplains in connection with the repair of existing structures. Specifically, the rule proposes to authorize the use of the abbreviated process for all of HUD's rehabilitation programs. The current regulations limit the use of the abbreviated process to repairs financed under HUD's mortgage insurance programs.

The proposed rule clarifies existing requirements, streamlines processes, and increases access to expedited approval procedures in certain circumstances. These changes would decrease burdens on small entities. Therefore, the undersigned has determined that the proposed rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in the preamble to this rule.

Environmental Impact

A Finding of No Significant Impact (FONSI) with respect to environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office

of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800-877-8339.

E.O. 13132 Federalism

E.O. 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This rule does not have federalism implications and would not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Paperwork Reduction Act

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). In accordance with the Paperwork Reduction Act, an agency

may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

The burden of the information collections in this proposed rule is estimated as follows:

REPORTING AND RECORDKEEPING BURDEN:

Section Reference	Number of Respondents	Number of Responses Per Respondent	Estimated Average Time for Requirement (in Hours)	Estimated Annual Burden (in Hours)
§ 55.20 Decision making process.	275	1	8	2,200
§ 55.21 Notification of floodplain hazard.	300	1	1	300
Totals	575	2	9	2,500

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposal by name and docket number (FR-5423-P-01) and be sent to:

HUD Desk Officer
Office of Management and Budget
New Executive Office Building
Washington, DC 20503
Fax number: 202-395-6947
and

Reports Liaison Officer
Office of Community Planning and Development
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-8000

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit comments, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

List of Subjects24 CFR Part 50

Environmental impact statements.

24 CFR Part 55

Environmental impact statements, Floodplains, Wetlands.

24 CFR Part 58

Community development block grants, Environmental impact statements, Grant programs – housing and community development, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble above, HUD proposes to amend 24 CFR parts 50, 55, and 58 as follows:

PART 50--PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

1. The authority citation for part 50 is revised to read as follows:

Authority: 42 U.S.C. 3535(d) and 4332; and Executive Order 11991, 3 CFR, 1977 Comp., p.123.

2. Revise § 50.4(b)(2) and (b)(3) to read as follows:

§ 50.4 Related federal laws and authorities.

* * * * *

(b) * * *

(2) HUD procedure for the implementation of E.O. 11988 (Floodplain Management), (3 CFR, 1977 Comp., p. 117)—24 CFR part 55, Floodplain Management and Protection of Wetlands.

(3) HUD procedure for the implementation of E.O. 11990 (Protection of Wetlands), (3 CFR, 1977 Comp., p. 121)—24 CFR part 55, Floodplain Management and Protection of Wetlands.

* * * * *

3. Revise the part heading for part 55 to read as set forth below.

PART 55--FLOODPLAIN MANAGEMENT AND PROTECTION OF WETLANDS

4. The authority citation for part 55 is revised to read as follows:

Authority: 42 U.S.C. 3535(d), 4001-4128 and 5154a; E.O. 11988, 42 FR 26951, 3 CFR, 1977 Comp., p. 117; E.O. 11990, 42 FR 26961, 3 CFR, 1977 Comp., p 121.

5. Amend § 55.1 as follows:

- a. Revise paragraph (a);
- b. Redesignate paragraph (b) as paragraph (b)(1);
- c. Add a new paragraph (b)(2);
- d. Revise paragraphs (c)(1);
- e. Revise paragraphs of (c)(3) and (c)(3)(i), to read as follows:

§ 55.1 Purpose and basic responsibility.

(a) (1) The purpose of Executive Order 11988 - Floodplain Management is “to avoid to the extent possible the long and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative.”

(2) The purpose of Executive Order 11990 - Protection of Wetlands is “to avoid to the extent possible the long and short-term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative.”

(3) This part implements the requirements of Executive Order 11988, Floodplain Management, and Executive Order 11990, Protection of Wetlands, and employs the principles of the Unified National Program for Floodplain Management. These regulations apply to all HUD (or responsible entity) actions that are subject to potential harm by location in floodplains or

wetlands. Covered actions include the proposed acquisition, construction, demolition, improvement, disposition, financing, and use of properties located in a floodplain or wetlands for which approval is required either from HUD under any applicable HUD program or from a responsible entity authorized by 24 CFR part 58.

(4) This part does not prohibit approval of such actions (except for certain actions in high hazard areas), but provides a consistent means for implementing the Department's interpretation of the Executive Orders in the project approval decision making processes of HUD and of responsible entities subject to 24 CFR part 58. The implementation of Executive Orders 11988 and 11990 under this part shall be conducted by HUD for Department-administered programs subject to environmental review under 24 CFR part 50 and by authorized responsible entities that are responsible for environmental review under 24 CFR part 58.

(5) Non-structural alternatives to floodplain development and the destruction of wetlands are both favored and encouraged to reduce the loss of life and property caused by floods, and to restore the natural resource and functions of floodplains and wetlands. Nonstructural alternatives should be discussed in the decision making where practicable.

(b) * * *

(2) Under section 582 of the National Flood Insurance Reform Act of 1994 (42 U.S.C. 5154a), HUD disaster assistance that is made available in a special flood hazard area may not be used to make a payment (including any loan assistance payment) to a person for repair, replacement, or restoration of damage to any personal, residential, or commercial property if:

(i) The person had previously received federal flood disaster assistance conditioned on obtaining and maintaining flood insurance; and

(ii) The person failed to obtain and maintain the flood insurance.

(c) * * *

(1) Any action other than a functionally dependent use or floodplain function restoration activity, located in a floodway;

(2) * * *

(3) Any non-critical action located in a Coastal High Hazard Area, unless the action is a functionally dependent use, an improvement of an existing structure, or reconstruction of a structure destroyed by a disaster. If the action is not a functionally dependent use, the action must be designed for location in a Coastal High Hazard Area. An action will be considered designed for a Coastal High Hazard Area if:

(i) In the case of reconstruction or substantial improvement, the work meets the current standards for V zones in FEMA regulations (44 CFR 60.3(e)) and, if applicable, the Minimum Property Standards for such construction in 24 CFR 200.926d(c)(4)(iii); or

* * * * *

6. Amend § 55.2 to:

a. Revise paragraph (a);

b. Revise paragraphs (b) and (b)(1);

c. Redesignate existing paragraphs (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), and (b)(8) as paragraphs (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), (b)(9), and (b)(10), respectively;

d. Add new paragraphs (b)(2) and (b)(8);

e. Revise newly designated paragraph (b)(9); and

f. Add new paragraph (b)(11) to read as follows:

§ 55.2 Terminology.

(a) With the exception of those terms defined in paragraph (b) of this section, the terms used in this part shall follow the definitions contained in section 6 of E.O. 11988, section 7 of E.O. 11990, and the Floodplain Management Guidelines for Implementing Executive Order 11988 (43 FR 6030, February 10, 1978), issued by the Water Resources Council; the terms “special flood hazard area,” “criteria,” and “Regular Program” shall follow the definitions contained in FEMA regulations at 44 CFR 59.1; and the terms “Letter of Map Revision” and “Letter of Map Amendment” shall refer to letters issued by FEMA as provided in 44 CFR part 65 and 44 CFR part 70, respectively.

(b) For purposes of this part, the following definitions apply:

(1) Coastal high hazard area means the area subject to high velocity waters, including but not limited to hurricane wave wash or tsunamis. The area is designated on a Flood Insurance Rate Map (FIRM) under FEMA regulations. FIRMs are also relied upon for the designation of “100-year floodplains” (§ 55.2(b)(9)), “500-year floodplains” (§ 55.2(b)(4)), and “floodways” (§ 55.2(b)(5)). Where FIRMs are declared by FEMA not to be the “best available information”, the latest interim FEMA information, such as an Advisory Base Flood Elevation (ABFE), shall be used as the source of these designations. If FEMA information is unavailable or insufficiently detailed, other federal, state, or local data may be used as “best available information” in accordance with E.O. 11988. However, a base flood elevation from an interim or preliminary or non-FEMA source cannot be used if it is lower than the current FIRM.

(2) Compensatory mitigation means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved.

Examples include, but are not limited to:

(i) Permittee-Responsible Mitigation: On-site or off-site mitigation undertaken by the holder of a wetlands permit under Section 404 of the Clean Water Act (or an authorized agent or contractor), for which the permittee retains full responsibility;

(ii) Mitigation Banking: A permittee's purchase of credits from a wetlands mitigation bank, comprising wetlands that have been set aside to compensate for conversions of other wetlands; the mitigation obligation is transferred to the sponsor of the mitigation bank; and

(iii) In-Lieu Fee Mitigation: A permittee's provision of funds to an in-lieu fee sponsor (public agency or nonprofit organization) that builds and maintains a mitigation site, often after the permitted adverse wetland impacts have occurred; the mitigation obligation is transferred to the in-lieu fee sponsor.

* * * * *

(8) New construction includes draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun after the effective date of E.O. 11990. (See Section 7(b) of E.O. 11990.)

(9) 100-year floodplain means the floodplain of concern for this part and is the area subject to inundation from a flood having a one percent or greater chance of flooding in any given year. (See § 55.2(b)(1) for appropriate data sources.)

* * * * *

(11) Wetlands means those areas that are inundated by surface or ground water with a frequency sufficient to support, and under normal circumstances does or would support, a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil

conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds. This definition includes those wetlands areas separated from their natural supply of water as a result of activities such as the construction of structural flood protection methods or solid-fill road beds and activities such as mineral extraction and navigation improvements. This definition includes both wetlands subject to and those not subject to section 404 of the Clean Water Act.

The following process shall be followed in making the wetlands determination:

(i) HUD or, for programs subject to 24 CFR part 58, the responsible entity, shall make a determination whether the action is new construction that is located in a wetland. These actions are subject to processing under the § 55.20 decision-making process for the protection of wetlands.

(ii) As primary screening, HUD or the responsible entity shall verify whether the project area is located in proximity to wetlands identified on the National Wetlands Inventory (NWI). If so, HUD or the responsible entity should make a reasonable attempt to consult with the Department of the Interior, Fish and Wildlife Service (FWS) for information concerning the location, boundaries, scale, and classification of wetlands within the area. If an NWI map indicates the presence of wetlands, FWS staff, if available, must find that no wetland is present in order for the action to proceed without further processing. Where FWS staff is unavailable to resolve any NWI map ambiguity or controversy, an appropriate wetlands professional must find that no wetland is present in order for the action to proceed without § 55.20 processing.

(iii) As secondary screening used in conjunction with NWI maps, HUD or the responsible entity is encouraged to use the Department of Agriculture, Natural Resources

Conservation Service (NRCS) National Soil Survey (NSS) and any state and local information concerning the location, boundaries, scale, and classification of wetlands within the action area.

(iv) Any challenges from the public or other interested parties to the wetlands determinations made under this part must be made in writing to HUD (or the responsible entity authorized under 24 CFR part 58) during the commenting period and must be substantiated with verifiable scientific information. Commenters may request a reasonable extension of the time for the commenting period for the purpose of substantiating any objections with verifiable scientific information. HUD or the responsible entity shall consult FWS staff, if available, on the validity of the challenger's scientific information prior to making a final wetlands determination.

7. In § 55.3, revise paragraphs (a)(1), (b)(1), (b)(2), and (c); and add new paragraph (d), to read as follows:

§ 55.3 Assignment of responsibilities.

(a)(1) The Assistant Secretary for Community Planning and Development (CPD) shall oversee:

(i) The Department's implementation of Executive Orders 11988 and 11990 and this part in all HUD programs; and

(ii) The implementation activities of HUD program managers and, for HUD financial assistance subject to 24 CFR part 58, of grant recipients and responsible entities.

* * * * *

(b) Other HUD Assistant Secretaries, the General Counsel, and the President of the Government National Mortgage Association (Ginnie Mae) shall:

(1) Ensure compliance with this part for all actions under their jurisdiction that are proposed to be conducted, supported, or permitted in a floodplain or wetland;

(2) Ensure that actions approved by HUD or responsible entities are monitored and that any prescribed mitigation is implemented;

* * * * *

(c) Responsible Entity Certifying Officer. Certifying Officers of responsible entities administering or reviewing activities subject to 24 CFR part 58 shall comply with part 55 in carrying out HUD-assisted programs. Certifying Officers of responsible entities subject to 24 CFR part 58 shall monitor approved actions and ensure that any prescribed mitigation is implemented.

(d) Recipient. Recipients subject to 24 CFR part 58 shall monitor approved actions and ensure that any prescribed mitigation is implemented. Recipients shall:

(1) Supply HUD (or the responsible entity authorized by 24 CFR part 58) with all available, relevant information necessary for HUD (or the responsible entity) to perform the compliance required by this part; and

(2) Implement mitigating measures required by HUD (or the responsible entity authorized by 24 CFR part 58) under this part or select alternate eligible property.

8. The heading for subpart B is revised to read as follows:

**Subpart B--Application of Executive Orders on Floodplain Management
and Protection of Wetlands**

9. Revise § 55.10 to read as follows:

§ 55.10 Environmental review procedures under 24 CFR parts 50 and 58.

(a) Where an environmental review is required under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321), and 24 CFR part 50 or part 58, compliance with this part shall be completed before the completion of an environmental assessment (EA), including a finding of no significant impact (FONSI), or an environmental impact statement (EIS), in accordance with the decision points listed in 24 CFR 50.17(a) - (h), or before the preparation of an EA under 24 CFR 58.40 or an EIS under 24 CFR 58.37. For types of proposed actions that are categorically excluded from NEPA requirements under 24 CFR part 50 (or part 58), compliance with this part shall be completed before the Department's initial approval (or approval by a responsible entity authorized by 24 CFR part 58) of proposed actions in a floodplain or wetland.

(b) The categorical exclusion of certain proposed actions from environmental review requirements under NEPA and 24 CFR parts 50 and 58 (see 24 CFR 50.20 and 58.35(a)) does not exclude those actions from compliance with this part.

10. Revise § 55.11 to read as follows:

§ 55.11 Applicability of Subpart C decision making process.

(a) Before reaching the decision points described in § 55.10(a), HUD (for Department-administered programs) or the responsible entity (for HUD financial assistance subject to 24 CFR part 58) shall determine whether E.O. 11988, E.O. 11990, and this part apply to the proposed action.

(b) If E.O. 11988 or 11990 and this part apply, the approval of a proposed action or initial commitment shall be made in accordance with this part. The primary purpose of E.O. 11988 is “to avoid to the extent possible the long and short term adverse impacts associated with

the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative.” The primary purpose of E.O. 11990 is “to avoid to the extent possible the long and short-term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative.”

(c) The following table indicates the applicability, by location and type of action, of the decision making process for implementing E.O. 11988 and E.O. 11990 under subpart C of this part.

TABLE 1				
Type of proposed action (new reviewable action or an amendment)¹	Type of Proposed Action			
	Floodways	Coastal High Hazard Areas	Wetlands or 100-year Floodplain outside Coastal High Hazard Area and Floodways	Non-wetlands Area outside of the 100-year and within the 500-year Floodplain
Critical Actions as defined in § 55.12(b)(2).	Critical actions not allowed.	Critical actions not allowed.	Allowed if the proposed critical action is processed under § 55.20. ²	Allowed if the proposed critical action is processed under § 55.20. ²
Non-critical actions not excluded under § 55.12(b) or (c).	Allowed only if the proposed non-critical action is a functionally dependent use and processed under § 55.20. ²	Allowed only if the proposed non-critical action: (A)(1) Is either (a) reconstruction of a structure destroyed by a disaster, or (b) an improvement of an existing structure; (2) is designed for a Coastal High Hazard Area under §55.1(c)(3); and (3) is processed under § 55.20.; ² or (B) Is a functionally dependent use processed under § 55.20.	Allowed if proposed non-critical action is processed under § 55.20. ²	Any non-critical action is allowed without processing under this part.

¹ Under E.O. 11990, the decision making process in § 55.20 only applies to federal assistance for new construction in wetlands locations.

² Or those paragraphs of § 55.20 that are applicable to an action listed in § 55.12(a).

11. Revise 55.12 to read as follows:

§ 55.12 Inapplicability of 24 CFR part 55 to certain categories of proposed actions.

(a) The decision making steps in § 55.20(b), (c), and (g) (steps 2, 3, and 7) do not apply to the following categories of proposed actions:

(1) HUD's or the recipient's actions involving the disposition of acquired multifamily housing projects or "bulk sales" of HUD-acquired (or under part 58 of recipients') one- to four-family properties in communities that are in the Regular Program of National Flood Insurance Program and in good standing (i.e., not suspended from program eligibility or placed on probation under 44 CFR 59.24). For programs subject to part 58, this subsection applies only to recipients' disposition activities that are subject to review under 24 CFR part 58.

(2) HUD's actions under the National Housing Act (12 U.S.C. 1701) for the purchase or refinancing of existing multifamily housing projects, hospitals, nursing homes, assisted living facilities, board and care facilities, and intermediate care facilities, in communities that are in good standing under the NFIP.

(3) HUD's or the recipient's actions under any HUD program involving the repair, rehabilitation, modernization, weatherization, or improvement of existing multifamily housing projects, hospitals, nursing homes, assisted living facilities, board and care facilities, intermediate care facilities, and one- to four-family properties, in communities that are in the Regular Program of the National Flood Insurance Program (NFIP) and are in good standing, provided that the number of units is not increased more than 20 percent, the action does not involve a conversion from nonresidential to residential land use, and the footprint of the structure and paved areas is not significantly increased.

(4) HUD's (or the recipient's) actions under any HUD program involving the repair, rehabilitation, modernization, weatherization, or improvement of existing nonresidential buildings and structures, in communities that are in the Regular Program of the NFIP and are in good standing, and provided that the footprint of the structure and paved areas are not significantly increased.

(b) The decision making process in § 55.20 shall not apply to the following categories of proposed actions:

(1) HUD's mortgage insurance actions and other financial assistance for the purchasing, mortgaging or refinancing of existing one- to four-family properties in communities that are in the Regular Program of the NFIP and in good standing (i.e., not suspended from program eligibility or placed on probation under 44 CFR 59.24), where the action is not a critical action and the property is not located in a floodway or Coastal High Hazard Area;

(2) Financial assistance for minor repairs or improvements on one- to four-family properties that do not meet the thresholds for "substantial improvement" under § 55.2(b)(10);

(3) HUD or a recipient's actions involving the disposition of individual HUD-acquired, one- to four-family properties; and

(4) HUD guarantees under the Loan Guarantee Recovery Fund Program (24 CFR part 573) of loans that refinance existing loans and mortgages, where any new construction or rehabilitation financed by the existing loan or mortgage has been completed prior to the filing of an application under the program, and the refinancing will not allow further construction or rehabilitation, nor result in any physical impacts or changes except for routine maintenance.

(5) The approval of financial assistance to lease an existing structure located within the floodplain, but only if—

(i) The structure is located outside the floodway or Coastal High Hazard Area, and is in a community that is in the Regular Program of the NFIP and in good standing (i.e., not suspended from program eligibility or placed on probation under 44 CFR 59.24);

(ii) The project is not a critical action; and

(iii) The entire structure is or will be fully insured or insured to the maximum under the NFIP for at least the term of the lease.

(c) This part shall not apply to the following categories of proposed HUD actions:

(1) HUD-assisted activities described in 24 CFR 58.34 and 58.35(b);

(2) HUD-assisted activities described in 24 CFR 50.19, except as otherwise indicated in § 50.19;

(3) HUD's implementation of the full disclosure and other registration requirements of the Interstate Land Sales Disclosure Act (15 U.S.C. 1701–1720);

(4) An action involving a repossession, receivership, foreclosure, or similar acquisition of property to protect or enforce HUD's financial interests under previously approved loans, grants, mortgage insurance, or other HUD assistance;

(5) Policy-level actions described at 24 CFR 50.16 that do not involve site-based decisions;

(6) A minor amendment to a previously approved action with no additional adverse impact on or from a floodplain or wetland;

(7) HUD's or the responsible entity's approval of a project site, an incidental portion of which is situated in an adjacent floodplain, including the floodway or Coastal High Hazard Area, or wetland, but only if:

(i) The proposed construction and landscaping activities (except for minor grubbing, clearing of debris, pruning, sodding, seeding, or other similar activities) do not occupy or modify the 100-year floodplain (or the 500-year floodplain for Critical Actions) or the wetland;

(ii) Appropriate provision is made for site drainage, that would not have an adverse effect on a wetland; and

(iii) A permanent covenant or comparable restriction is placed on the property's continued use to preserve the floodplain or wetland;

(8) HUD's or the responsible entity's approval of financial assistance for a project on any nonwetland site in a floodplain for which the Federal Emergency Management Agency (FEMA) has issued:

(i) A final Letter of Map Amendment (LOMA), final Letter of Map Revision (LOMR), or final Letter of Map Revision Based on Fill (LOMR-F) that removed the property from a FEMA-designated floodplain location; or

(ii) A conditional LOMA, conditional LOMR, or conditional LOMR-F if HUD or the responsible entity's approval is subject to the requirements and conditions of the conditional LOMA or conditional LOMR;

(9) Issuance or use of Housing Vouchers, Certificates under the Section 8 Existing Housing Program, or other forms of rental subsidy where HUD, the awarding community, or the public housing agency that administers the contract awards rental subsidies that are not project-based (i.e., do not involve site-specific subsidies);

(10) Special projects directed to the removal of material and architectural barriers that restrict the mobility of and accessibility to elderly and persons with disabilities;

(11) The approval of financial assistance for acquisition, leasing, construction, rehabilitation, repair, maintenance, or operation of ships and other water-borne vessels that will be used for transportation or cruises and will not be permanently moored; and

(12) The approval of financial assistance for restoring and preserving the natural and beneficial functions and values of floodplains and wetlands, including through acquisition of such floodplain and wetlands property, but only if:

- (i) The property is cleared of all existing structures and related improvements;
- (ii) The property is dedicated for permanent use for flood control, wetlands protection, park land, or open space; and
- (iii) A permanent covenant or comparable restriction is placed on the property's continued use to preserve the floodplain or wetlands from future development.

12. The heading for subpart C is revised to read as follows:

**Subpart C--Procedures for Making Determinations on Floodplain Management
and Protection of Wetlands**

13. Amend §55.20 as follows:

- a.** Revise the introductory paragraph;
- b.** Revise paragraph (a);
- c.** Revise paragraphs (b) and b(3);
- d.** Revise paragraphs (c) (d), and (e);
- e.** Revise paragraphs (f), (g)(1), and (h) to read as follows:

§ 55.20 Decision making process.

Except for actions covered by § 55.12(a), the decision making process for compliance with this part contains eight steps, including public notices and an examination of practicable alternatives when addressing floodplains and wetlands. The steps to be followed in the decision making process are as follows:

(a) Step 1. Determine whether the proposed action is located in wetlands or the 100-year floodplain (500-year floodplain for critical actions). If the action does not occur in a floodplain or wetland, then no further compliance with this part is required. The following process shall be followed by HUD (or the responsible entity) in making wetlands determinations.

(1) Refer to § 55.28(a) where an applicant has submitted with its application to HUD (or to the recipient under programs subject to 24 CFR part 58) an individual Section 404 permit (including approval conditions and related environmental review).

(2) Refer to § 55.2(b)(11) for making wetlands determinations under this part.

(3) For proposed actions occurring in both wetlands and a floodplain, completion of the decision making process under § 55.20 is required regardless of the issuance of a Section 404 permit. In such a case, the wetlands will be considered among the primary natural and beneficial functions and values of the floodplain.

(b) Step 2. Notify the public and agencies responsible for floodplain management or wetlands protection at the earliest possible time of a proposal to consider an action in a 100-year floodplain (or a 500-year floodplain for a Critical Action) or wetlands and involve the affected and interested public and agencies in the decision making process.

* * * * *

(3) A notice under this paragraph shall state: the name, proposed location, and description of the activity; the total number of acres of floodplain or wetlands involved; the

related natural and beneficial functions and values of the floodplain or wetlands that may be adversely affected by the proposed activity; the HUD approving official (or the Certifying Officer of the responsible entity authorized by 24 CFR part 58); and phone number to contact for information. The notice shall indicate the hours and the HUD or responsible entity's office, and any website at which a full description of the proposed action may be reviewed.

(c) Step 3. Identify and evaluate practicable alternatives to locating the proposed action in a 100-year floodplain (or a 500-year floodplain for a Critical Action) or wetland.

(1) Except as provided in paragraph (c)(2) of this section, HUD's or the responsible entity's consideration of practicable alternatives to the proposed site selected for a project should include:

(i) Locations outside and not affecting the 100-year floodplain (or the 500-year floodplain for a Critical Action) or wetland;

(ii) Alternative methods to serve the identical project objective, including feasible technological alternatives; and

(iii) A determination not to approve any action proposing the occupancy or modification of floodplains or wetland.

(2) Practicability of alternative sites should be addressed in light of the following:

(i) Natural values such as topography, habitat, and hazards;

(ii) Social values such as aesthetics, historic and cultural values, land use patterns, and environmental justice; and

(iii) Economic values such as the cost of space, construction, services, and relocation.

(3) For multifamily projects involving HUD mortgage insurance that are initiated by third parties, HUD's consideration of practicable alternatives should include a determination not to approve the request.

(d) Step 4. Identify and evaluate the potential direct and indirect impacts associated with the occupancy or modification of the 100-year floodplain (or the 500-year floodplain for a Critical Action) or the wetlands and the potential direct and indirect support of floodplain and wetlands development that could result from the proposed action.

(1) Floodplain evaluation: The focus of the floodplain evaluation should be on adverse impacts to lives and property, and on natural and beneficial floodplain values. Natural and beneficial values include:

(i) Water resources such as natural moderation of floods, water quality maintenance, and groundwater recharge;

(ii) Living resources such as flora and fauna;

(iii) Cultural resources such as archaeological, historic, and recreational aspects; and

(iv) Agricultural, aquacultural, and forestry resources.

(2) Wetlands evaluation: In accordance with Section 5 of E.O. 11990, the decision maker shall consider factors relevant to a proposal's effect on the survival and quality of the wetlands. Among these factors that should be evaluated are:

(i) Public health, safety, and welfare, including water supply, quality, recharge, and discharge; pollution; flood and storm hazards and hazard protection; and sediment and erosion;

(ii) Maintenance of natural systems, including conservation and long-term productivity of existing flora and fauna; species and habitat diversity and stability; natural hydrologic function; wetland type; fish; wildlife; timber; and food and fiber resources;

(iii) Cost increases attributed to wetland-required new construction and mitigation measures to minimize harm to wetlands that may result from such use; and

(iv) Other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.

(e) Step 5. Where practicable, design or modify the proposed action to minimize the potential adverse impacts to and from the 100-year floodplain (or the 500-year floodplain for a Critical Action) or the wetlands and to restore and preserve its natural and beneficial functions and values.

(1) Minimization techniques for floodplain and wetlands purposes include, but are not limited to: the use of permeable surfaces, natural landscape enhancements that maintain or restore natural hydrology through infiltration, native plant species, bioswales, evapotranspiration, stormwater capture and reuse, green or vegetative roofs with drainage provisions, and Natural Resource Conservation Service conservation easements. Floodproofing and elevating structures, including freeboarding above the required base flood elevations, are also minimization techniques for floodplain purposes.

(2) Appropriate and practicable compensatory mitigation is recommended for unavoidable adverse impacts to more than one acre of wetlands. Compensatory mitigation includes, but is not limited to: permittee-responsible mitigation, mitigation banking, in-lieu fee mitigation, the use of preservation easements or protective covenants, and any form of mitigation promoted by state or federal agencies. The use of compensatory mitigation may not substitute for the requirement to avoid and minimize impacts to the maximum extent practicable.

(3) Actions covered by § 55.12(a) must be rejected if the proposed minimization is financially or physically unworkable. All critical actions in the 500-year floodplain shall be

designed and built at or above the 100-year floodplain (in the case of new construction) and modified to include:

- (i) Preparation of and participation in an early warning system;
- (ii) An emergency evacuation and relocation plan;
- (iii) Identification of evacuation route(s) out of the 500-year floodplain; and
- (iv) Identification marks of past or estimated flood levels on all structures.
- (f) Step 6. Reevaluate the proposed action to determine:

(1) Whether the action is still practicable in light of exposure to flood hazards in the floodplain or wetland, possible adverse impacts on the floodplain or wetland, the extent to which it will aggravate the current hazards to other floodplains or wetlands, and the potential to disrupt the natural and beneficial functions and values of floodplains or wetlands; and

(2) Whether alternatives preliminarily rejected at Step 3 (paragraph (c)) of this section are practicable in light of information gained in Steps 4 and 5 (paragraphs (d) and (e)) of this section.

(i) The reevaluation of alternatives shall include the potential impacts avoided or caused inside and outside the floodplain or wetlands area. The impacts should include the protection of human life, real property, and the natural and beneficial functions and values served by the floodplain or wetland.

(ii) A reevaluation of alternatives under this step should include a discussion of economic costs. For floodplains, the cost estimates should include savings or the costs of flood insurance, where applicable, flood proofing, and elevation to at least the base flood elevation for sites located in floodplains, as appropriate. For wetlands, the cost estimates should include the cost of filling the wetlands and mitigation.

(g) Step 7. (1) If the reevaluation results in a determination that there is no practicable alternative to locating the proposal in the 100-year floodplain (or the 500-year floodplain for a Critical Action) or the wetland, publish a final notice that includes:

- (i) The reasons why the proposal must be located in the floodplain or wetland;
- (ii) A list of the alternatives considered in accordance with § 55.20(c)(1) and (2); and
- (iii) All mitigation measures to be taken to minimize adverse impacts and to restore and preserve natural and beneficial functions and values.

* * * * *

(h) Step 8. Upon completion of the decision making process in Steps 1 through 7, implement the proposed action. There is a continuing responsibility on HUD (or on the responsible entity authorized by 24 CFR part 58) and the recipient (if other than the responsible entity) to ensure that the mitigating measures identified in Step 7 are implemented.

14. Amend § 55.21 by removing the term “grant recipient” and adding in its place the term “responsible entity.”

15. Revise § 55.24 to read as follows:

§ 55.24 Aggregation.

Where two or more actions have been proposed, require compliance with subpart C of this part, affect the same floodplain or wetland, and are currently under review by HUD (or by a responsible entity authorized by 24 CFR part 58), individual or aggregated approvals may be issued. A single compliance review and approval under this section is subject to compliance with the decision making process in § 55.20.

16. Revise § 55.25 as follows:

a. Remove, in paragraph (c), the term “grant recipient” and add in its place the term “responsible entity”; and

b. Remove in paragraph (d)(2) the term “grant recipients” and add in its place the term “responsible entities.”

17. In § 55.26, revise the introductory paragraph and paragraph (a), to read as follows:

§ 55.26 Adoption of another agency's review under the Executive Orders.

If a proposed action covered under this part is already covered in a prior review performed under either or both of the executive orders by another agency, including HUD or a different responsible entity, that review may be adopted by HUD or by a responsible entity authorized under 24 CFR part 58, provided that:

(a) There is no pending litigation relating to the other agency's review for floodplain management or wetlands protection;

* * * * *

18. Amend § 55.27 as follows:

a. Revise paragraph (a);

b. Remove, in paragraph (b), the term “grant recipient” and add, in its place, the words “responsible entity” and;

c. Remove, in paragraph (c), the term “grant recipients” and add, in its place, the words “responsible entities”, to read as follows:

§ 55.27 Documentation.

(a) For purposes of compliance with § 55.20, the responsible HUD official who would approve the proposed action (or Certifying Officer for a responsible entity authorized by 24 CFR part 58) shall require that the following actions be documented:

(1) When required by § 55.20(c), practicable alternative sites have been considered outside the floodplain or wetland, but within the local housing market area, the local public utility service area, or the jurisdictional boundaries of a recipient unit of general local government, whichever geographic area is most appropriate to the proposed action. Actual sites under review must be identified and the reasons for the nonselection of those sites as practicable alternatives must be described; and

(2) Under § 55.20(e)(2), measures to minimize the potential adverse impacts of the proposed action on the affected floodplain or wetland as identified in § 55.20(d) have been applied to the design for the proposed action.

* * * * *

19. Add new § 55.28 to read as follows:

§ 55.28 Use of individual permits under section 404 of the Clean Water Act for HUD 11990 processing where all wetlands are covered by the permit.

(a) Processing requirements. HUD (or the responsible entity subject to 24 CFR part 58) shall not be required to perform the steps at § 55.20(a), (b), (c), (d), and (e) upon adoption by HUD (or the responsible entity) of the terms and conditions of a Section 404 permit so long as:

(1) The project involves new construction on a property located outside of the 100-year floodplain (or the 500-year floodplain for critical actions);

(2) The applicant has submitted, with its application to HUD (or to the recipient under programs subject to 24 CFR part 58), an individual Section 404 permit (including approval conditions) issued by the Army Corps of Engineers (USACE) for the proposed project; and

(3) All wetlands adversely affected by the action are covered by the permit.

(b) Unless a project is excluded under § 55.12, processing under all of § 55.20 is required for new construction in wetlands that are not subject to USACE jurisdiction and for new construction for which the USACE issues a general permit under Section 404.

PART 58--ENVIRONMENTAL REVIEW PROCEDURES FOR ENTITIES ASSUMING HUD ENVIRONMENTAL RESPONSIBILITIES

20. The authority citation for part 58 continues to read as follows:

Authority: 12 U.S.C. 1707 note; 42 U.S.C. 1437o(i)(1) and (2), 1437x, 3535(d), 3547, 4332, 4852, 5304(g), 11402, and 12838; E.O. 11514, 3 CFR, 1966-1970, Comp., p. 902, as amended by E.O. 11991, 3 CFR, 1977 Comp., p.123.

21. Revise § 58.5(b)(2) to read as follows:

§ 58.5 Related federal laws and authorities.

* * * * *

(b) * * *

(2) E.O. 11990, Protection of Wetlands, May 24, 1977 (42 FR 26961), 3 CFR, 1977 Comp., p. 121, as interpreted in HUD regulations at 24 CFR part 55, particularly sections 2 and 5 of the order.

* * * * *

22. Add § 58.6(a)(4).

§ 58.6 Other requirements.

* * * * *

(a) * * *

(4) Flood insurance requirements cannot be fulfilled by self-insurance except as authorized by law for assistance to state-owned projects within states approved by the FEMA Administrator consistent with 44 CFR 75.11.

* * * * *

23. Revise § 58.35(a)(3)(i) to read as follows:

§58.35 Categorical exclusions.

* * * * *

(a)* * *

(3)* * *

(i) In the case of a building for residential use (with one to four units), the density is not increased beyond four units, and the land use is not changed;

* * * * *

Date: November 14, 2011

Mercedes M. Márquez
Assistant Secretary for Community Planning
and Development

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